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February 27, 2017

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CHAMBERS OF
JUDGE MARRERO

VIA E-MAIL

Steven Cooper, Esq.
Reed Smith LLP
599 Lexington Avenue
New York, New York 10022

Re: ED Capital, LLC et ano. (collectively, "Plaintiffs") v. Bloomfield Investment Resources Corp., et al. (collectively, "Defendants"), No. 15-cv-9056 (USDC/SDNY)

Dear Steven:

Pursuant to Judge Marrero's rules, we write in response to your letter dated February 13, 2017 (the "Letter"). Your Letter provides no basis for Defendants' proposed motion to dismiss the detailed claims set forth in Plaintiffs' First Amended Complaint ("FAC"). Defendants should not waste the parties' and the Court's time with unnecessary motion practice.

The First Amended Complaint Adequately Alleges Breach of Contract Under the Collateral Contract Doctrine. While both Defendants and their expert concede that the collateral contract doctrine grants parties such as Plaintiffs the right to sue for breaches under Cayman law, the only dispute is as to whether the FAC's *factual allegations* support such a claim. (Letter at 1.)

First, and most fundamentally, disagreement about the truth of the allegations is not a basis for a motion to dismiss. Rather, if Plaintiffs' allegations are accepted as true—which they must be on a motion to dismiss—a valid claim exists and the motion must be denied.[1]

Second, Defendants' attack on the factual assertions is nonsensical and actually confirms that Plaintiffs alleged a valid claim. Bloomfield concedes that the collateral

[1] *See, e.g.*, *Bounasera v. Honest Co., Inc.*, --- F. Supp.3d ---, 2016 WL 5812589, at *3 (S.D.N.Y. Sept. 23, 2016) (Marrero, J.)("The court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor."); *Ladenburg Thalmann & Co., Inc. v. Imaging Diagnostic Sys., Inc.*, 176 F. Supp. 2d 199, 205 (S.D.N.Y. 2001) (Marrero, J.) (factual questions concerning validity of contract cannot be decided on motion to dismiss); *AllGood Entm't, Inc. v. Dileo Entm't and Touring, Inc.*, 726 F. Supp. 2d 307, 319 (S.D.N.Y. 2010) (factual questions concerning existence of contract cannot be decided on motion to dismiss).

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contract doctrine would apply if "Bloomfield and Plaintiffs entered into a separate contract, the consideration for which was the making of the subscription agreement[,]" but claims that "Plaintiffs seek to have the opposite apply in alleging that Bloomfield entered into the Subscription Agreement as consideration for the collateral contract whereby Plaintiffs promised to manage and invest the funds, *as set forth and described in the Memorandum and the documents referenced therein.*" (Letter at 1 (internal quotation marks omitted; emphasis in original).) As Defendants concede, Plaintiffs allege that Bloomfield entered into the Subscription Agreement as consideration for their collateral contract with Plaintiffs that the ED Capital Entities would act as the investment advisor and manager, and manage the funds in a manner that was described in the Memorandum and referenced documents. In other words, Plaintiffs alleged exactly what Defendants maintain is necessary to state a cause of action under the collateral contract doctrine.[2]

Third, to the extent Defendants' unsupported assertion that "Plaintiffs have no legitimate challenge to Defendants' expert on Cayman Island law" is meant to be an attack on the legal sufficiency of the claims, Defendants' criticism fails. (Letter at 1.) It is axiomatic that Plaintiffs need not brief legal arguments in their FAC. Moreover, Defendants' purported expert explicitly recognized the existence of the collateral contract doctrine, but simply concluded without analysis that it was inapplicable. (Hatfield Decl. ¶¶ 19, 25.) In fact, Defendants and their expert cite no contrary case law and admit that it is a valid theory that can grant third-parties rights to enforce contractual promises. (Letter at 1.) Far from establishing that Plaintiffs' claims have no basis under Cayman Island law, Defendants actually confirm the validity of pleaded claim.

The First Amended Complaint Adequately Alleges a Promissory Estoppel Claim. Defendants' misplaced argument that Plaintiffs' promissory estoppel claim fails under Cayman Island law simply ignores that Plaintiffs specifically pleaded this claim under New York law. (FAC ¶ 85.) Defendants half-hearted argument that Cayman law should govern because of the location of the investment fund (Letter at 2 n.4) ignores that Plaintiffs specifically allege that the "promises and detrimental reliance were made in New York[,]" that Plaintiffs are New York entities and that the negotiations leading to the agreement took place in New York. (FAC ¶¶ 9, 85.) Under those circumstances, the jurisdiction with the most significant contacts is New York.[3]

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[2] Defendants' factual disagreement is troubling, since Defendants asserted before multiple courts that Bloomfield entered into the Subscription Agreement as part of a separate, oral contract to loan money. (*See, e.g.*, Defs.' Appeal Br. at 1-2; ECF No. 10-3 at 15 ("In order to record this purely formal exercise—given the aforementioned explanation provided by Daniloff—Bushev on 3 November 2011 on behalf of Bloomfield signed a subscription agreement.").) Thus, even under Defendants' theory (which Plaintiffs vigorously deny), the Subscription Agreement was consideration for a collateral contract.

[3] *See NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F. Supp. 1004, 1011 n.11 (S.D.N.Y. 1991) (place of detrimental reliance); *Nat'l Oil Well Maint. Co. v. Fortune Oil & Gas, Inc.*, No. 02-cv-7666, 2005

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Plaintiffs' Tort Claims Are Adequately Plead. Defendants' simply ignore the well-plead allegations of the FAC in repeating their prior assertions that Plaintiffs failed to plead (i) special damages; (ii) facts supporting an abuse of process claim and (iii) a non-duplicative prima facie tort claim separate from the breach of contract claims (which Defendants quixotically argue are non-existent). *First*, the cases Defendants rely on did not involve as detailed allegations of damages as the FAC does.[4] *Second*, Defendants ignore that Plaintiffs devoted ten paragraphs (nearly 20% of the FAC, excluding causes of action) detailing the factual basis for the abuse of process claim, namely that Defendants' intent to pressure the ED Capital Entities to return Defendants' investment. (*See* FAC ¶¶ 29-38.) New York courts have explicitly held that the conduct alleged here constitutes abuse of process.[5] *Third*, unlike in *Bekhor v. Jospehtal Group, Inc.*[6] and *Envirocon, Inc. v. Alcoa, Inc.*,[7] Plaintiffs' prima facie tort claim is not a mere allegation that Plaintiffs breached their contractual promises, but rather that Defendants intentionally inflicted harm by instituting the Dutch Action and issuing harassing discovery requests with the improper purpose and malevolent desire to harm Plaintiffs. (*See* First Am. Compl. ¶¶ 58-65.)[8]

Defendants have failed to set forth any legitimate critique of the FAC.

SO ORDERED. The Clerk of Court is directed to enter into the public docket of this action the letter above submitted by plaintiffs
2-28-17
DATE
VICTOR MARRERO, U.S.D.J.

Very truly yours,

Richard J.L. Lomuscio

cc: Hon. Judge Victor Marrero, U.S.D.J. (via facsimile)

WL 1123735, at *4 (S.D.N.Y. May 11, 2005) (place promises were made); *AllGood*, 726 F. Supp. 2d at 317, 321 (place of negotiations). Defendants' rely on *BNP Paribus Mortg. Corp. v. Bank of Am., N.A.*, 949 F. Supp. 2d 486, 517 (S.D.N.Y. 2013), where there was no promissory estoppel claim because there were no "clear and unambiguous" promises to third-parties and the required elements of promissory estoppel were not "adequately plead[.]" Here, Plaintiffs alleged all the elements and several explicit promises made to them, including, indemnification and confidentiality obligations. (*See* FAC ¶¶ 83-102.)

[4] *See Azby Brokerage, Inc. v. Allstate Ins. Co.*, 681 F. Supp. 1084, 1088 (S.D.N.Y. 1988) (claimed lost commissions of "'at least ten million dollars'"); *Wehringer v. Helmsley-Spear, Inc.*, 91 A.D.2d 585, 586 (1st Dep't 1982) (summary judgment granted when no evidentiary support for alleged damages "in the amount of not less than one hundred thousand dollars").

[5] *See Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers' Ass'n*, 38 N.Y.2d 397, 404 (N.Y. 1975) (third-party subpoenas issued with intent to harass real party in interest is an abuse of process).

[6] No. 96-cv-4156, 2000 WL 1521198, at *8 (S.D.N.Y. Oct. 13, 2000).

[7] No. 06-cv-0549, 2006 WL 2460640, at *3 (N.D.N.Y. Aug. 23, 2006).

[8] Defendants' assertion that Plaintiffs' prejudgment attachment claim fails because Plaintiffs substantive claims fail is erroneous. As discussed above, Plaintiffs' substantive claims are meritorious and thus they state a valid claim for prejudgment attachment.